SUPREME COURT, U.S.
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No. : 09-704

In the

Supreme Court of the United States

MICHAEL D. CORNWELL AND HILARY J. IKER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* LARRY E. TUCKER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE[1]

Amicus, Larry E. Tucker, is interested in this case because, in June 2008, he first raised the identical Appointments Clause issue in his own case before the United States Tax Court (Tax Court Docket No. 3165-06L). His case is the original source of nearly all of the Appointments Clause arguments made by the petitioners herein. As detailed below, the Appointments Clause issue has been extensively briefed since then in Mr. Tucker's case, but the Tax Court has not yet ruled. Rather, the Tax Court has ordered a fifth set of briefs on the Appointments Clause issue. Since the petitioners did not raise the Appointments Clause issue either in the Tax Court or the Ninth Circuit, it makes sense

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[1] This brief *amicus curiae* in support of petitioners' application is filed in accordance with Rule 37.2(a). The parties have consented to the filing of this brief The petitioners are currently proceeding in this case *pro se*. Both the petitioners and counsel of record for the respondent, the Solicitor General of the United States, received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part; nor did any person other than Yeshiva University, the employer of counsel for the *amicus curiae*, the Director of the Cardozo Tax Clinic, make a monetary contribution to the preparation or submission of this brief. Larry E. Tucker is a client of the Cardozo Tax Clinic. Since 2004, the Cardozo Tax Clinic has been representing him for free in his collection matters with the Internal Revenue Service and in his United States Tax Court litigation against the Commissioner of Internal Revenue in connection therewith. The Cardozo Tax Clinic is operated by the Benjamin N. Cardozo School of Law of Yeshiva University.

to here acquaint this Court at more length than usual with the *Tucker* case:

In 2004, the Internal Revenue Service (hereinafter, the "IRS") filed a notice of tax lien against Mr. Tucker. In response, under 26 U.S.C. §6320, he timely requested a "Collection Due Process" (hereinafter, "CDP") hearing from the IRS Office of Appeals (hereinafter, the "Appeals Office"). At the hearing, to resolve his tax liabilities, Mr. Tucker submitted an offer-in-compromise (hereinafter, an "OIC"). The hearing was held before an employee of respondent's Appeals Office with the title of "Settlement Officer". In January 2006, the OIC was denied in a notice of determination issued by the Settlement Officer and her "Appeals Team Manager". Mr. Tucker then filed an appeal of this denial with the Tax Court, arguing both that the reason given by the Settlement Officer for denying his OIC was not a valid legal one and that only "Appeals Officers", not "Settlement Officers", were authorized by statute (as opposed to IRS delegation orders) to hold CDP hearings and issue CDP rulings.

Within a few months, respondent abandoned the reasoning of the Settlement Officer for denying Mr. Tucker's OIC and moved for a remand of the case to the Appeals Office for issuance of a supplemental notice of determination. Over Mr. Tucker's strenuous objection to a mere "do over", the Tax Court ordered the remand. Before the remand occurred, Mr. Tucker moved that the Tax Court direct that an Appeals Officer hold the remand, not a Settlement Officer. However, the Tax Court found an ambiguity in the statute (26 U.S.C. §6330(b) and

(c)) that it thought authorized any "officer or employee" of the Appeals Office to issue the ruling, citing the Tax Court's recent memorandum opinion in *Reynolds v. Commissioner*, T.C. Memo. 2006-192. Thus, the Tax Court permitted the remand to be held by a Settlement Officer.

In September 2006, a new Settlement Officer and the same Appeals Team Manager issued a supplemental notice of determination again denying Mr. Tucker's OIC, but on different grounds. Thereafter, the parties cross moved for summary judgment on the issue of whether the denial of the OIC was an abuse of discretion.

In June 2008, while those cross motions were pending, the Tax Court allowed Mr. Tucker to amend his petition to allege: "To date, no Appeals Officer, Settlement Officer, or Appeals Team Manager has been appointed to his or her job by the President of the United States with the advice and consent of the Senate;" and "No statute provides for the appointment of Appeals Officers, Settlement Officers, or Appeals Team Managers by the President alone, the 'Heads of Department', or the 'Courts of Law', as those terms are used in the Appointments Clause of the Constitution."

In response, the respondent admitted both sentences. See petitioners' petition in the instant case at App., pp. A-22 to A-23. Then, in September 2008, Mr. Tucker moved that the Tax Court disregard the rulings in the supplemental notice of determination on the ground that the persons issuing the rulings were not properly appointed. The

Tax Court filed Mr. Tucker's Appointments Clause motion as a motion to remand, directed that the pending but undecided cross motions for summary judgment in the case be held in abeyance, and directed respondent to file a response to the Appointments Clause motion.

The Tax Court has taken the Appointments Clause motion in *Tucker* very seriously. It has repeatedly ordered further legal memoranda on the issue. One order of Tax Court Judge David Gustafson, dated January 16, 2009, stated, in part:

> The same reasoning that would resolve this tax case arising under Title 26 would have to be able to apply broadly across the federal administrative agencies. The ... Court is concerned that it not decide this case from a too-narrow tax perspective.
>
> . . . .
>
> 1. . . . . The Court would like to be informed of examples of federal employees who are acknowledged to be "Officers" within the meaning of the Appointments Clause, whose office (like that of an appeals officer) is *not* explicitly created by statute (like the Special Trial Judge), but rather is referred to in a statute (like the appeals officer).
>
> 2. On the other hand, the Court would also like to be informed of examples of federal employees whose positions are referred to (but

not explicitly created in) a statute, and who are hired and not "appointed", but who have responsibilities or powers comparable to appeals officers and thus might be affected by a conclusion that appeals officers are "Officers" within the meaning of the Appointments Clause.

To date, at the direction of the Tax Court, the parties in *Tucker* have already filed four sets of legal memoranda on the Appointments Clause motion. Further, A. Lavar Taylor, Adjunct Professor of Law, Chapman University School of Law, Director, Center for the Fair Administration of Taxes, has filed with the Tax Court an *amicus curiae* brief in support of Mr. Tucker's Appointments Clause argument. The last set of the parties' briefs in *Tucker* was filed in late March 2009, but on December 1, 2009, the Tax Court issued a 6-page order for another set of briefs -- respondent's to be filed by January 15, 2010 and Mr. Tucker's to be filed by February 15, 2010 -- primarily addressed to how final the respondent considers the CDP rulings of Appeals personnel to be within the IRS.

A second argument in *Tucker* concerns the remedy if the Appointments Clause was violated. Mr. Tucker has asked that the Tax Court order another remand to the Appeals Office -- this time for a properly-appointed person to rule on his OIC. Although not stated in the petition for *certiorari* herein, presumably, this is the relief that the petitioners seek, as well. Further, because an OIC amount and payment terms are proposed based on facts existing at the time the OIC is made, Mr.

Tucker argues that any remand should not inquire into facts postdating the issuance of the original CDP notice of determination.

ARGUMENT

I. THE COLLECTION DUE PROCESS APPOINTMENTS CLAUSE ISSUE WARRANTS SUPREME COURT REVIEW AT THIS TIME

In 1998, Congress enacted what it called the "Collection Due Process" provisions of the Internal Revenue Code -- 26 U.S.C. §§6320 and 6330 -- by §3401(a) and (b) the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206 (hereinafter, the "1998 Act"). The CDP provisions allow taxpayers to request hearings at the Appeals Office either shortly before or shortly after the IRS takes either of two potentially devastating collection actions: a levy or the filing of a notice of federal tax lien. In those hearings, the hearing officer must evaluate the appropriateness of collection actions, and taxpayers can propose collection alternatives -- such as an OIC, an installment agreement, or being placed into "currently not collectible status." Taxpayers may also request relief from joint and several liability and, in limited circumstances, raise challenges to the underlying tax liability.

Like Mr. Tucker, the petitioners submitted an OIC at a CDP hearing, and they were denied the OIC in a notice of determination issued by a Settlement Officer and an Appeals Team Manager.

Like Mr. Tucker, the petitioners timely appealed the denial to the Tax Court. Unlike Mr. Tucker, the petitioners did not raise the Appointments Clause argument during their Tax Court or Ninth Circuit appeal. Thus, neither court discussed the Appointments Clause when finding no abuse of discretion.

In their petition for a writ of *certiorari*, the petitioners rely on this Court's opinions in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Freytag v. Commissioner*, 501 U.S. 868 (1991), to argue that CDP hearing officers – whether they be Appeals Officers, Settlement Officers, and/or Appeals Team Managers – indeed, whichever among them is "the Decider" -- are now established by law and now exercise such significant authority on behalf of the United States that they must be appointed. In *Tucker*, respondent has contended otherwise, arguing:

> Appeals officers do not exercise significant authority because: (1) the scope of their duties and the review they conduct under CDP (as in other contexts) are limited; (2) their determinations are not the IRS's final decision regarding collection; and (3) their positions are not established by law. Although RRA 98 [the Internal Revenue Service Restructuring and Reform Act of 1998], codified a collection review mechanism largely already performed by the Office of Appeals, Congress did not establish by law an office that exercises significant authority or is delegated sovereign

> powers of the government. Thus, Appeals officers are employees, not inferior officers.

Respondent's October 31, 2008 memorandum in *Tucker*, at 7.

In deciding whether to grant the writ of *certiorari* in this case, the importance of this constitutional question both to the separation of powers and to the revenue cannot be understated:

First, as to the revenue: In the fiscal year ending September 30, 2009, nearly $50 billion was collected by the IRS through its enforcement mechanisms. IRS Fiscal Year 2009 Enforcement Results, available at www.irs.gov. In that same year, the IRS filed 965,618 notices of federal tax lien and served 3,478,181 levies on third parties. *Id.* At least hundreds of thousands of potential CDP-triggering notices preceded these lien filings and levies. In the fiscal year ended September 30, 2008, the IRS Appeals Office closed 27,024 CDP cases (through hearing or taxpayer withdrawal of the hearing request). Respondent's January 22, 2009 memorandum in *Tucker*, at 14. As of the end of that fiscal year, 1,333 CDP appeals were pending in the Tax Court, and 157 CDP appeals were pending before the Courts of Appeals. Respondent's October 31, 2008 memorandum in *Tucker*, at 33. For the last six fiscal years, the IRS National Taxpayer Advocate has reported to Congress that court proceedings involving appeals from CDP notices of determinations were the first- or second- "most frequently litigated tax issue" -- with the courts issuing about 200 opinions each year in CDP cases.

IRS National Taxpayer Advocate 2003 Annual Report to Congress (Dec. 31, 2003), at pp. 314-316; IRS National Taxpayer Advocate 2004 Annual Report to Congress (Dec. 31, 2004), at vol. I, pp. 496-497; IRS National Taxpayer Advocate 2005 Annual Report to Congress (Dec. 31, 2005), at vol. I, p. 473; IRS National Taxpayer Advocate 2006 Annual Report to Congress (Dec. 31, 2006), at vol. I, p. 555; IRS National Taxpayer Advocate 2007 Annual Report to Congress (Dec. 31, 2007), at. vol. I, pp.560-561; IRS National Taxpayer Advocate 2008 Annual Report to Congress (Dec. 31, 2008), at vol. I, p. 457.

Second, there is the separation of powers issue: In assigning administrative adjudicative duties that have historically been wielded by appointed officers to mere unappointed civil servants, the Executive Branch is undermining the important protections of the Appointments Clause and the political accountability that the Founding Fathers intended that the Clause impose. In this case, the Executive has both made the President immune from blame by not being directly responsible for naming bad administrative judges in the IRS and has cut out (without Congress's permission) Congress' right and obligation to provide advice and consent to particular administrative judges. Thus, this case also presents an important occasion for this Court to clarify who needs to be appointed under the Appointments Clause in the federal administrative judiciary.

At present, all "administrative law judges" (hereinafter, "ALJs") who issue rulings under the procedures of the Administrative Procedure Act are

appointed pursuant to the procedures of the Appointments Clause. Respondent's February 27, 2009 memorandum in *Tucker*, at 9, reported: "As of June 2008, there were 1,388 administrative law judges serving in various federal agencies . . . . Data from OPM [Office of Personnel Management] Central Data Personnel File Report, June 2008. . . . An individual must be certified by OPM and appointed under 5 U.S.C. §3105 in order to be an administrative law judge." Respondent also attached to this memorandum in *Tucker* a table from the cited OPM report showing that 1,137 of these 1,388 appointed ALJs worked for the Social Security Administration, but not a single one of them worked for the Department of the Treasury or the Internal Revenue Service.

In *Tucker*, respondent also attached as an exhibit to the same memorandum an unpublished survey by Raymond Limon, Esq., Acting Deputy Assistant Director, Office of Administrative Law Judges, entitled "The Federal Administrative Judiciary: Then and Now, A Decade of Change, 1992-2002" (Dec. 23, 2002) (hereinafter, the "Limon Paper"), reporting the results of a 2002 survey of "non-ALJ" federal "administrative judges". The Limon Paper stated that in 2002, the federal administrative judiciary contained 3,183 non-ALJ "administrative judges". The distinction drawn between ALJs and non-ALJs is that the latter hearing officers do not hold hearings complying in all respects with the Administrative Procedure Act. Many of those non-ALJ "administrative judges" are also appointed, such as the 56 members of the Board of Veterans Affairs, who are appointed by the

President alone or by the Secretary of the Department of Veterans Affairs pursuant to 38 U.S.C. §§7101(b)(1) and 7101A(a)(1); the 62 administrative patent judges, who are appointed by the Secretary of Commerce pursuant to 35 U.S.C. §6(a); the 15 administrative trademark judges, who are appointed by the Secretary of Commerce pursuant to 15 U.S.C. §1067(b); and the 228 immigration judges in the Executive Office for Immigration Review of the Department of Justice, who are appointed by the Attorney General pursuant to 8 U.S.C. §1101(b)(4).

The largest contingents of non-ALJ "administrative judges" listed in the Limon Paper were 1,000 patent examiners working for the Board of Patent Appeals and Interferences (who appear to be more like IRS revenue agents than hearing officers) and 750 IRS Appeals Officers and 200 IRS Settlement Officers. A more recent breakdown of Appeals Office personnel (as of September 30, 2006) is 812 Appeals Officers and 310 Settlement Officers; IRS National Taxpayer Advocate 2006 Annual Report to Congress (Dec. 31, 2006) at vol. I, p. 277; though the number of Settlement Officers is anecdotally rising because of increasing demand for CDP hearings. It is the over 300 Settlement Officers and their Appeals Team Managers who are potentially at risk by the Appointments Clause issue raised in this case, since they are the ones who currently hold nearly all CDP hearings.

In his February 27, 2009 memorandum in *Tucker*, at 11, respondent admitted: "IRS Appeals employees conducting CDP hearings fall into the

category of non-ALJ hearing officers." But, he pointed out that some other similar hearing officers in other Departments who were named in statutes (just like IRS "Appeals Officers") were not appointed. However, the examples given by respondent of unappointed persons named in statutes to hold hearings were few and were usually of non-ALJ hearing officers who did not render the final decision of the Department, but simply rendered a decision that could be reviewed on a *de novo* standard by an appointed person within the Department if an aggrieved person requested or if an appointed person in the Department decided to step in. Thus, it appears that the largest number of unappointed non-ALJ hearing officers is the over 300 IRS Settlement Officers and Appeals Team Managers at issue in this case. A decision that these hearing officers must be appointed will have repercussions in other Executive Departments, but to far fewer employees in these other Departments. Yet, it will still set forth important constitutional limits as to the ability of the Executive or the Congress to establish similar new posts in an end run around the Appointments Clause.

This Court is considering an Appointments Clause issue in *Free Enterprise Fund and Beckstead and Watts, LLP v. Public Company Accounting Oversight Board*, 537 F.3d 667 (D.C. Cir. 2008), Sup. Ct. Docket No. 08-861. However, in that case, the issue turns on the question of regular "Officer" versus "inferior Officer" under the Clause. Thus, the decision in that case is not likely to resolve whether administrative judges in the IRS are so unimportant in their duties that they do not even constitute

"inferior Officers". So, the Court should still agree to hear the petitioners' case.

More likely to be affected by the petitioner's case is the separation of powers issue presented by the creation of Executive Department "Czars". For example, after the passage of the Troubled Asset Relief Program, the Treasury Secretary administratively created a "Special Master" for compensation. The Treasury Secretary appointed Kenneth Feinberg to the post, without the advice and consent of the Senate or a law from Congress delegating to the Treasury Secretary the right to appoint without its consent. Former Tenth Circuit Judge Michael W. McConnell is now a professor at Stanford Law School, director of its Constitutional Law Center, and a senior fellow at the Hoover Institution. He has publicly argued that Mr. Feinberg – by virtue of his substantial powers -- is at least an "inferior Officer" of the United States who has to be appointed under the Appointments Clause to issue valid rulings. *See* Michael W. McConnell, "The Pay Czar Is Unconstitutional", *Wall Street Journal*, Oct. 30, 2009, at A25. A ruling that CDP hearing officers are required to be appointed may give guidance to whether the "Pay Czar" in the same Department needs to be appointed. Professor McConnell is now one of the many law school professors, described below, following developments in the CDP hearing officer appointments cases, *Tucker* and the instant case.

Congress also has become concerned that its Appointments Clause powers are being usurped by the Executive with respect to other "Czars". Indeed,

the concern has been so great that hearings were held in the Senate in October. "[T]his Administration has appointed at least 18 new 'czars.' None of these officials was vetted through the Senate confirmation process. Their authorities and duties remain unclear. Their future plans have received little public airing. Their relationship with Cabinet-level officials is undefined. They rarely, if ever, testify before Congressional committees." Statement of Senator Susan M. Collins, *Hearings on Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars*, Senate Comm. on Homeland Security and Governmental Affairs (Oct. 22, 2009), at pp. 4-5, available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=5b22e173-5b74-46a0-b2ab-d300b6381de4.

Respondent's counsel in *Tucker*, has informed counsel for the *amicus* that there are already three other Tax Court petitioners who have raised the Appointments Clause issue and are awaiting the Tax Court's ruling in *Tucker*. But, there are far more people interested in the outcome of *Tucker* who are taking a wait and see approach to raising the issue. At American Bar Association Tax Section meetings and meetings involving other free low-income taxpayer clinics, counsel for the *amicus* has been asked to update other lawyers about the progress of the *Tucker* case. Professors at law schools across the country who specialize in administrative law, constitutional law, and tax law have also asked counsel for the *amicus* to keep them updated on the *Tucker* case. Counsel for the *amicus* published an article on the subject over a year ago. See Carlton

M. Smith, "Does The Failure to Appoint Collection Due Process Hearing Officers Violate the Constitution's Appointments Clause?", Vol. 10, No. 5 *J. Tax Practice & Procedure* 35 (Oct.-Nov. 2008). An earlier version of this article is available for download at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279060. Because of the publication of this article, other tax practitioners are aware of the constitutional argument and the seriousness of it. Counsel for the *amicus* has discussed the argument with lawyers high up in the IRS (Deborah Butler, the current IRS Associate Chief Counsel (Procedure and Administration)) and the Department of Justice Tax Section Appellate Section (Gilbert Rothenberg). A deputy to IRS National Taxpayer Advocate Nina Olson has asked counsel for the *amicus* to keep the deputy copied on all briefs filed in the Tucker case, and counsel for the *amicus* has done so.

Should individuals or entities desire to gum up the tax collection works, all they need to do now is to stop paying their taxes and ask for a CDP hearing by an appointed officer. Currently, there are none. It would be too risky for the IRS to await a ruling from the Tax Court in *Tucker* (apparently coming no earlier than late 2010 now) and then follow the slow progression of the Appointments Clause issue up through the appellate courts.

This Court has a history of taking up important tax procedures issues, even in the absence of Circuit splits or when lower courts have ruled and found no problem. For example, *Freytag v. Commissioner, supra*, involved a challenge to the Tax Court's Special Trial Judges based on the

Appointments Clause. *Freytag* is the principal opinion of this Court on which the petitioners rely in this case. Prior to *Freytag*, 18 lower-court judges had considered the Appointments Clause issue (15 Tax Court judges and 3 Second Circuit judges) and none had found a problem, yet this Court decided to take up the issue because of its importance to the separation of powers, to tax procedure, and to the revenue. Similarly, in *Ballard v. Commissioner*, 544 U.S. 40 (2005), only 1 of 9 Circuit judges thought there was an impropriety in the Tax Court's not including in the appellate record for review a copy of the Special Trial Judge's report, yet this Court took up the issue and reversed, finding an impropriety.

By contrast, in the Settlement Officer case, a single Tax Court judge in *Tucker* has not been able to convince himself that there is no constitutional violation – despite four sets of briefs already filed by respondent, spanning over a year. The government has been thinking about this issue for over 18 months (since June 2008) and already now has written well over a hundred pages of briefs on the issue in *Tucker*. Taxpayers and *amicus* in *Tucker* have written even more pages on the subject. Even though the petitioners in this case did not raise the issue of the Appointments Clause in the courts below, the issue is ripe for argument in this Court.

The remedy issue was not discussed in the petition, but should also be considered. The remedy should be a remand for a rehearing before a properly-appointed Appeals Office person. In that rehearing, the Appeals Office person should only be allowed to consider such facts as existed up to and

including the date that the original notice of determination was issued. Financial facts change daily. The Tax Court has held that it does not renegotiate or try to determine a correct OIC, but merely that it reviews whether the IRS abused its discretion in rejecting the exact OIC proposed. *Murphy v. Commissioner*, 125 T.C. 301, 320 (2005), *affd.* 469 F.3d 27 (1st Cir. 2006) ("We do not conduct an independent review of what would be an acceptable offer in compromise. . . . The extent of our review is to determine whether the Appeals officer's decision to reject the offer in compromise actually submitted by the taxpayer was arbitrary, capricious, or without sound basis in fact or law." (internal citations omitted)). If a remand results in an inquiry into current financial facts, then the original OIC will certainly be in the incorrect current amount. Thus, the original OIC will automatically be rejected. In sum, relief given of a remand to consider current facts would be wholly illusory, as it would never result in the original OIC being accepted.

The relief of a remand would not be burdensome. The first remand in *Tucker* in 2006 took fewer than 5 business days from the time the new Settlement Officer got the files. Oddly, however, respondent in *Tucker* has argued that, even if there was an Appointment Clause violation, there should be no relief. Respondent argues that the Tax Court should apply the *de facto* officer doctrine to validate any actions taken by unappointed officers who should have been appointed. Respondent's October 31, 2008, memorandum in *Tucker*, at 30-34;

Respondent's January 22, 2009, memorandum in *Tucker*, at 9-17.

In *Ryder v. United States*, 515 U.S. 177 (1995), after this Court found an Appointments Clause violation, it refused to apply the *de facto* officer doctrine and ordered a new court-martial panel hearing before a properly-appointed panel. Respondent, in *Tucker*, argues that, despite *Ryder*, the *de facto* officer doctrine may still be applied in civil cases involving Appointments Clause violations and that it would be too burdensome to allow Mr. Tucker another remand to the Appeals Office. In other words, a remand is not a burden when respondent simply cries "Mulligan", but a remand is a burden when respondent violates the Constitution. The Court should ask for briefing in the instant case on this astounding proposition.

II. THE HISTORICAL BACKGROUND OF THE IRS APPEALS OFFICE AND THE BOARD OF TAX APPEALS SUPPORTS THE NEED FOR APPOINTMENT OF COLLECTION DUE PROCESS HEARING OFFICERS

Ever since Congress established the Treasury Department in 1789, the federal government has provided an administrative appeal process to taxpayers who do not agree with proposed tax assessments. IRS National Taxpayer Advocate 2006 Annual Report to Congress (Dec. 31, 2006) at vol. I, p. 266. The current Office of Appeals was administratively created in 1978 as a successor to what had been known as "the Appellate Division".

See Amendments to the Statement of Procedural Rules (26 C.F.R. Part 601), published in 43 F.R. 44,510 (Sept. 28, 1978), 1978-2 C.B. 543. While some employees of the Appellate Division may have had the title "Appeals Officer" for some time before the reorganization, employees of the new Office of Appeals referred to as "Appeals Officers" were first referred to by that name in these 1978 amendments. See, e.g., 26 C.F.R. §601.105(c)(1)(ii).

The historic role of an Appeals Officer has been to resolve disagreements with income, estate, and gift tax audit adjustments proposed by the IRS Examination Division. When the Examination Division issues its report, it invites a taxpayer who disagrees to file a protest requesting a conference with the Appeals Office. See IRS Publication 5, Your Appeal Rights and How to Prepare a Protest if You Don't Agree. Appeals Officers are experts in the tax law, both substantive and procedural tax law – trained to read court opinions, even though not usually lawyers. Many Appeals Officers are former Examination Division revenue agents. Appeals Officers resolve matters before them on a practical basis, using "hazards of litigation" settlement authority not available to the Examination Division employees. 26 C.F.R. §601.106(f)(2). Appeals Officers frequently take settlement jurisdiction over Tax Court deficiency cases and resolve most, so that IRS lawyers only have to litigate or settle a few. 26 C.F.R. §601.106(d)(3)(iii); Rev. Proc. 87-24, 1987-1 C.B. 720.

Settlement Officers were first created in the late 1980s or early 1990s to work collection cases in

the Appeals Office. Respondent's Answers to Petitioner's Request for Admissions (Nov. 3, 2006) in *Tucker*, paras. 1 and 4. In 2002, then-IRS Commissioner Charles Rossotti told Congress that "until relatively recently, IRS Appeals dealt with few collection issues. It began moving toward post-collection work in the 1990s when a number of programs were established to ensure taxpayers had the right to dispute actions, such as levies and liens. At the same time, we began hiring settlement officers (former revenue officers with collection background) to handle these cases." Testimony of Charles Rossotti to the Joint Committee on Taxation Annual Joint Review Progress Report on the Internal Revenue Service Restructuring and Reform Act of 1998 (May 14, 2002) at para. 97, reproduced at 2002 TNT 94-19 (May 15, 2002). These comments about Settlement Officers were addressed to the period before the passage of the 1998 Act. For an article discussing the differences between the two Appeals Office employees and why Congress probably did not know of the existence of Settlement Officers when it enacted CDP and did not intend for Settlement Officers to hold CDP hearings, see Carlton M. Smith, "Settlement Officers Shouldn't Hold Collection Due Process Hearings", 121 *Tax Notes* 609 (Nov. 3, 2008), and 2008 TNT 214-26 (Nov. 4, 2008).

Since 1998, the IRS has increasingly shifted CDP hearings from Appeals Officers to lower-paid Settlement Officers. Unlike generalist Appeals Officers, Settlement Officers are narrow collection specialists, with no substantive tax knowledge and almost no experience in settling cases facing possible

de novo review in the Tax Court or other courts. They too often misapply the law, apply Internal Revenue Manual collection provisions in rigid, impractical ways, and show basic unfamiliarity with common business and personal financial transactions. However, it is unnecessary for this Court to resolve whether Congress authorized the IRS to substitute Settlement Officers for Appeals Officers in holding CDP hearings. If this Court holds that no Appeals Office employee needs to be appointed for CDP, then the lower courts can deal with any issues of statutory authorization as to which employees may rule. If this Court holds that CDP hearing personnel must be appointed, then Congress and the President will have to appoint some, thereby rendering moot for the future the question of whether any particular kind of person must be appointed.

Before the Tax Court's predecessor, the Board of Tax Appeals, was created in 1924, the only way to litigate a civil tax dispute was by a refund lawsuit in court under what is now 28 U.S.C. §1346(a)(1). The taxpayer first had to pay all of the tax (in the 19th Century, usually, a tariff) and then file an administrative claim for the alleged excessive amount. If the government denied the claim, the taxpayer could bring suit in district court or the Court of Claims. See *Flora v. United States*, 362 U.S. 145, 151-161 (1960).

Shortly before World War I, Congress enacted the income, estate, and gift taxes, and there arose a hue and cry that this pay-first, litigate-later system was inadequate with respect to proposed deficiencies

in such new taxes. In response, the predecessor of the IRS, the Bureau of Internal Revenue (hereinafter, the "BIR"), set up an internal committee in the predecessor of the current Appeals Office: The "Committee on Appeals and Review" was an advisory committee, eventually having 20 members, whose job was to hear appeals of deficiency assessments before collection thereof and to hear claims for abatement of assessed taxes. H. Dubroff, *The United States Tax Court: An Historical Analysis* (CCH 1979), at 39-45. But this Committee was thought by many to be inadequate and potentially biased.

Accordingly, President Coolidge proposed (1) creation of a Board of Tax Appeals within the Treasury Department but outside the BIR and (2) that the Treasury Secretary be given the power to appoint its members pursuant to the procedures for appointing "inferior Officers" contained within the Appointments Clause. *Id.* at 52-53. In 1924, when Congress actually created the Board of Tax Appeals, though, it made the Board an Executive agency independent of the Treasury Department, and provided by statute for the appointment of the Board's members by the President with the advice and consent of the Senate. *Id.* at 55-60; Revenue Act of 1924, ch. 234, §900(a), (b), and (k), 43 Stat. 336-338. Congress limited the Board's jurisdiction to "deficiencies" in income, estate, excess profits, and gift taxes that had not yet been assessed – i.e., prior, as well, to collection – and review of jeopardy assessments for which claims for abatement had been filed. Revenue Act of 1924, ch. 234, §§ 274(a), 279(b), 308(b), 312(b), and 324, 43 Stat. 297, 300,

308, 312, 316. The Board was, in effect, a statutory successor to the nonstatutory Committee on Appeals and Review. Duroff, op. cit. at 43 ("In many respects the Board of Tax Appeals was a continuation of the Committee.").

Congress knew in 1924 that it could not by statute create a new pre-collection administrative hearing in the Executive (a Board of Tax Appeals) without the hearing employees being "Officers" subject to appointment under the Appointments Clause. In 1991, this Court confirmed that Congress was right with respect to the successor to the Board of Tax Appeals – the Article I court known as the Tax Court. In *Freytag v. Commissioner*, *supra*, all nine Justices held that Special Trial Judges of the Tax Court were "inferior Officers" under the Appointments Clause.

In the 1990s, taxpayers raised another hue and cry that the pre-collection hearings of the Tax Court were inadequate to prevent collection abuses by the IRS – the successor to the BIR. In response, Congress held hearings. "A 'system of administrative law judges' was proposed during the Senate Finance Committee hearings leading up to enactment of RRA 98. *IRS Restructuring: Hearing on H.R. 2676 Before the Senate Comm. on Finance*, 105th Cong. 128 (1998) (statement of Robert Schriebman, Tax Attorney). Congress at that time considered outside administrative law judges but selected Appeals employees due, in part, to the informality of the hearings and the efficiency of assigning 'new' duties that were essentially the same as their existing duties." Respondent's October 31,

2008 memorandum in *Tucker*, at 17 (footnote omitted). As a result, unlike what Congress did in 1924, this time, Congress created the statutory hearing right within the IRS Appeals Office.

What is odd is that, in 1998, Congress seems to have forgotten that, in creating another statutory pre-collection hearing in an Executive Department, the hearing employees were being given such powers by law that they also had to be appointed under the Appointments Clause. Congress cannot simply decide to give an important new statutory hearing to a preexisting lower-paid civil servant and thereby avoid the Appointments Clause or this would make the Clause a mere point of protocol or etiquette. "The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing 'Officers of the United States,' but the drafters had a less frivolous purpose in mind." *Buckley v. Valeo*, supra, at 125.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the decision of the Ninth Circuit to consider the Appointments Clause issues.

Respectfully submitted,

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